



The State of New Hampshire  
**DEPARTMENT OF ENVIRONMENTAL SERVICES**

Thomas S. Burack, Commissioner



February 20, 2007

Representative Anne-Marie Irwin, Chairman  
Executive Departments and Administration Committee  
Legislative Office Building, Room 306  
Concord, NH 03301

**Re: HB 439, An act relative to certain rulemaking authority of the commissioner of environmental services**

Dear Chairman Irwin and Members of the Committee:

Thank you for the opportunity to comment in support of HB 439, relative to certain rulemaking authority of the commissioner of environmental services. The Department of Environmental Services requested this bill to address concerns raised by the Legislative Budget Assistant ("LBA") as a result of the audit of the Department that was conducted in 2005.<sup>1</sup>

In its audit report, the LBA identified 11 statutory provisions that conferred rulemaking authority on the Department that the LBA asserted were both mandatory and unfulfilled. In reviewing the LBA's findings, we reached conclusions about 8 of those provisions that are reflected in HB 439 as follows:<sup>2</sup>

Section 1: The rulemaking authority under RSA 146-C:12, I, is not needed; funds are not distributed outside the agency, so it makes more sense to rely on the federal requirements already applicable to the Department. The Department is requesting that the language be modified as shown on page 1, lines 8-11 to reflect this.

Section 2: The rulemaking authority under RSA 146-D:5-a, II is not needed. (The Department did have rules at one time but did not readopt them per advice received from the Attorney General's Office.) Statutory provisions already exist setting forth competitive bidding requirements, so it makes more sense to have those provisions referenced here. The Department is requesting that the language be modified as shown on page 1, lines 17-18 to reflect this.

Sections 3 and 4: The rulemaking authority under RSA 149-M:30, II (second sentence) is not needed; the priority ranking system identify in this paragraph is already in paragraph I of the same section, and the requirement to use it is clearly spelled out in the first sentence of paragraph II. The Department thus is requesting that the second sentence be deleted, as shown on page 1, lines 24-25. The rulemaking authority under RSA 149-M:7, XII for the cleanup of waste sites was not identified by the LBA but duplicates the authority under RSA 149-M:30, II and so likewise is not needed.

<sup>1</sup> The Department sought similar legislation last year; the bill, HB 1523, passed the House and was recommended Ought to Pass by the Senate Committee, but the Senate tabled the bill without explanation.

<sup>2</sup> Of the remaining 3 provisions, rules under RSA 486-A:8, III relative to prioritization of grants for regional drinking water systems and evaluation of contributing groundwater areas to public wells with contamination were already in process at the time of the audit (Env-Ws 393, effective November 30, 2005); rules under RSA 487:18 relative to prioritization factors for grants to control exotic aquatic weeds were adopted effective September 5, 2006 (Env-Wq 1306); and rules under RSA 483-A:7, II relative to awarding financial grants to regional planning commissions in support of lake management and shoreland protection planning are under development.

Section 5: Rules under RSA 486:10 relative to certifying operators of private wastewater pretreatment facilities are not needed at this time and the Department does not have the resources at this time to implement the program contemplated by the provision. However, the Department believes that the program may, in the future, be needed, and so is requesting to preserve the authority but in non-mandatory form (*i.e.*, change "shall" adopt rules to "may" adopt rules, as shown on page 2, line 1). The Department also recommends the language changes shown on page 2, lines 2-3 to clarify the program that would be implemented under this language.

Section 6: Rules under these statutory provisions are not needed (as discussed below), so the Department is requesting that the provisions be repealed:

- I. RSA 149-N, relative to the recycling logo: It has been the Department's experience that if matters of this type (use of the recycling logo) are to be regulated, then they need to be regulated on a consistent regional (or national) basis so as to not convert the State's boundaries to product barriers. (That is, without consistent regional/national regulation, the likely effect of attempting to regulate the use of the recycling logo in New Hampshire would be that New Hampshire citizens would have fewer choices of products.) Of the two organizations mentioned in RSA 149-N:4, II (with whom the Department is supposed to be coordinating standards), the Northeast Recycling Council (of the Council of State Governments) is not doing anything in this area and the Northeast Source Reduction Council of the Coalition of Northeast Governors is now defunct.
- II. RSA 339:71-76, relative to the use of plastic rings as packaging for bottles and cans: The issue addressed by these provisions is the use of plastic rings as a packaging technique, which is now regulated federally. Consistent with Department testimony in 1995 (on a proposed amendment to the statute), the provisions are unnecessary. In any event, the Legislature has not provided the resources (funds, positions) necessary for this program to be implemented since its original enactment in 1989.
- III. RSA 486:2, relative to adopting rules to require regional wastewater treatment plants: This was originally enacted in the early 1970s in response to EPA requirements under the Construction Grants program, which no longer exists. In any event, the Department believes there are better ways to encourage regional treatment plants (if desired) than by adopting rules to require it.
- IV. RSA 487:5, relative to rulemaking to control marine pollution and aquatic growth: This is a very broad delegation of rulemaking authority that is not needed, as the provisions of RSA 487:1-14 (to which this language originally applied) are self-executing. The later sections of the chapter relative to exotic aquatic weeds have separate, more specific, rulemaking authority.

Thank you for your consideration of these comments. If you have any questions, please contact Gretchen Hamel, Legal Unit Administrator, at 271-3137 or [ghamel@des.state.nh.us](mailto:ghamel@des.state.nh.us).

Sincerely,



Thomas S. Burack  
Commissioner

cc: Representative Betsey Patten  
Representative Maurice Pilotte